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No. 85-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

ALASKA AIRLINES, INC., *et al.*,
Petitioners,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The United States Court of Appeals for the District of Columbia Circuit has created a completely new standard for determining whether the unconstitutional provisions in a statutory section may be severed from the remaining provisions. Under this standard, the traditional approach of determining congressional intent is no longer the lodestar. It has been replaced by a requirement that the challenging party show that Congress would have preferred *no legislation* in the subject area at all rather than the remaining provisions of the statutory section. The questions thus presented are:

1. Did the D.C. Circuit err by establishing a new severability standard that would allow the remaining statutory provisions to survive even though they function contrary to congressional intent and there is evidence that Congress would have enacted a different type of statute if it had known that certain provisions were invalid?

2. Did the court of appeals err in holding that a legislative veto provision in the employee protection program in Section 43 of the Airline Deregulation Act of 1978, 49 U.S.C. app. § 1552 (1982), is severable from the remainder of that section simply because the court concluded that Congress would have preferred the severed statute to no employee protection at all?

PARTIES TO THE PROCEEDINGS

Petitioners are Alaska Airlines, Inc.; American Airlines, Inc.; Capitol Air, Inc.; Delta Air Lines, Inc.; The Flying Tiger Line, Inc.; Midway Airlines, Inc.; Northwest Airlines, Inc.; Ozark Air Lines, Inc.; Piedmont Aviation, Inc.; Trans World Airlines, Inc.; United Air Lines, Inc.; USAir, Inc.; Western Air Lines, Inc.; and Wien Air Alaska, Inc.*

Respondents are William E. Brock, individually and as Secretary of Labor (as successor in office to Raymond J. Donovan); United States Department of Labor; the United States of America; and the following intervenors: Air Line Pilots Association, International; Association of Flight Attendants; Brotherhood of Railway and Airline Clerks; Flight Engineers' International Association; International Association of Machinists and Aerospace Workers; and Transport Workers Union of America.

Amici are Air Florida; Air One, Inc.; Arrow Air, Inc.; Empire Airlines; People Express Airlines, Inc.; and Southwest Airlines Co.

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* In accordance with Supreme Court Rule 28.1, the parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of petitioners are set forth in App. D hereto.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Alaska Airlines, Inc., *et al.*, hereby petitions for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, reversing the district court, is reported at 766 F.2d 1550 (D.C. Cir. 1985), and appears at App. A. The opinion of the district court is reported at 594 F. Supp. 92 (D.D.C. 1984), and appears at App. B.

JURISDICTION

The opinion and judgment of the court of appeals was entered on July 16, 1985. The court of appeals denied petitioners' petition for rehearing and suggestion for rehearing en banc on September 11, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution, Article I, Section 1.

United States Constitution, Article I, Section 7, Clauses 2 and 3.

Section 43 of the Airline Deregulation Act of 1978, 49 U.S.C. app. § 1552 (1982).

Department of Labor regulations under Section 43 of the Airline Deregulation Act of 1978, 48 Fed. Reg. 52,854-65 (1983).

The constitutional provisions, statutes and regulations involved are reprinted in App. C.

STATEMENT

The D.C. Circuit has adopted and applied in this case a completely new standard for determining whether Congress intended a statutory section to survive even though integral provisions therein have been held unconstitutional. Under the court's test, a preferential hiring scheme authorized in Section 43 of the Airline Deregulation Act of 1978 (hereinafter "Deregulation Act" or "ADA") would survive even though it functions contrary to the intent of Congress unless the challenging party can demonstrate to the court that Congress would have preferred no employee protection program at all. The traditional test—whether Congress would have intended the surviving provisions of the section to function independently of the invalidated provisions—has been discarded. Thus, the court rejected as irrelevant evidence that Congress would have preferred a different form of employee protection if it had known that certain provisions in the program it enacted were invalid.

A. Statutory Background

In 1978, Congress passed the Deregulation Act, which mandated the phasing out of economic regulation of domestic aviation. *See* Pub. L. No. 95-504, 92 Stat. 1705

(1978) (codified in scattered sections of 49 U.S.C. app. (1982)). Congress correctly predicted that deregulation would increase airline industry employment overall, S. Rep. No. 631, 95th Cong., 2d Sess. 113, 115 (1978) (hereinafter "Senate Report"), but it recognized the "theoretical possibility" that some employees might lose their jobs as a direct result of the ADA. *Id.* at 113. As "insurance" against this unlikely contingency, it enacted Section 43, which authorized certain benefits for "protected employees," *i.e.*, employees who as of October 24, 1978, had at least four years of employment with an airline then certificated by the Civil Aeronautics Board ("CAB"). Section 43(h)(1), 49 U.S.C. app. § 1552(h)(1) (1982).

Subsection (f) of Section 43 authorized the Department of Labor ("DOL") to issue regulations, subject to a legislative veto, to implement the two "closely linked components" of the employee protection program ("EPP"). *Alaska Airlines, Inc. v. Donovan*, 594 F. Supp. 92, 93 (D.D.C. 1984), *rev'd*, 766 F.2d 1550 (D.C. Cir. 1985). First, if an air carrier experienced severe work force contractions or bankruptcy as a result of the Deregulation Act, its furloughed or terminated "protected employees" were entitled to monthly assistance payments and other monetary benefits from the federal government. *See* Section 43(a), (b), (c), 49 U.S.C. app. § 1552(a), (b), (c). DOL was to publish guidelines establishing the amount of assistance payments for various employment categories. As the second part of the program, selected airlines (*i.e.*, CAB-certificated carriers as of October 24, 1978) were to have a duty to hire "protected employees" who were terminated by competing airlines. *See* Section 43(d), 49 U.S.C. app. § 1552(d). DOL proposed extensive regulations to implement this part.

Since Congress was uncertain about the need for, and dimensions of, such a new regulatory program in an act whose purpose was deregulation, it established unusually elaborate procedures to ensure continuing congressional

involvement in the program's development. Congress directed DOL to promulgate regulations implementing the EPP "within six months" of October 24, 1978. Section 43(f)(2), 49 U.S.C. app. § 1552(f)(2). It further established a two-stage congressional review process. First, proposed rules were to be submitted to congressional committees responsible for aviation oversight for thirty "legislative days" (*i.e.*, days "on which both Houses of Congress are in session"). Section 43(f)(3), (4), 49 U.S.C. app. § 1552(f)(3), (4). Thereafter, DOL's final rules were to be submitted to the entire Congress for an additional sixty "legislative day" review period. *Id.* During this period the rules were subject to veto by either house of Congress. This is the only legislative veto provision in the entire Deregulation Act. It expressly limited and exclusively applied to Congress' Section 43(f) grant of new regulatory authority to DOL, a Department not otherwise involved in airline deregulation. The Deregulation Act does not contain a severability clause.

Despite the six-month deadline, DOL did not publish the final regulations at issue here until November 22, 1983, five years after the statutory deadline. *See* 48 Fed. Reg. 52,854 (1983). The regulations ignored the Government's compensation obligations under Section 43 and attempted to implement only the duty to hire aspects of the EPP. On June 23, 1983, this Court had declared legislative veto provisions unconstitutional, *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), but DOL nonetheless delayed the regulations' effective date for sixty legislative days (*i.e.*, until on or about May 17, 1984).[1]

The regulations establish a preferred class of "designated employees," which includes employees terminated or furloughed for reasons totally unrelated to deregulation. *See* 48 Fed. Reg. 52,854, at 52,861-62 (1983). The regu-

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[1] The final regulations are reprinted in App. C.

lations impose novel and extraordinary obligations on some, but not all, commercial air carriers. *See id.* at 52,862-64. These include a mandatory obligation to hire "designated employees" laid off by competitors for any job vacancies (*e.g.*, pilots, flight attendants, accountants, secretaries, marketing specialists) before considering any other job applicants, regardless of the applicants' comparative qualifications. This obligation overrides safety-related airline hiring policies and most affirmative action, veterans preference, and other legal hiring duties imposed on the airlines by federal statute. *See id.* § 220.10., .11, .20, .21, .23(j), .24, .29. The hiring duty even extends to persons who are gainfully employed in their occupational specialty by a competing airline at the time they apply. The consistency of DOL's expansive duty-to-hire program with the statutory purpose could not be tested as Congress had intended because the legislative veto had been declared invalid prior to promulgation of the regulations.

B. Proceedings Below

In February 1984, petitioners brought this action against DOL in the district court, and on March 9, 1984, they filed a motion for summary judgment challenging the statute and regulations on several grounds. DOL and several labor union intervenors [2] then filed cross-motions for summary disposition.

On May 18, 1984, the district court (Judge Gesell) granted petitioners' motion for summary judgment, declaring Section 43 unconstitutional. The court held that the invalid legislative veto provision therein "is inex-

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[2] Intervenors are Air Line Pilots Association, International; Association of Flight Attendants; Brotherhood of Railway and Airline Clerks; Flight Engineers' International Association; International Association of Machinists and Aerospace Workers; and Transport Workers Union of America (the latter four hereinafter collectively referred to as "BRAC").

tricably bound to the remainder of that section and that Congress would not have enacted the remainder of § 43 in its absence." 594 F. Supp. at 96 (footnote omitted). Judge Gesell described the applicable standard as follows:

> The question is not, of course, whether Congress would have enacted *some* type of employee protection plan in the absence of a legislative veto provision; rather, the issue is whether Congress would have enacted the *same* statute. If not, the Court cannot enforce the remainder of the statute merely because it might be an approximation of what Congress would have enacted. The task of determining the most preferable alternative to an unconstitutional statute belongs not to the courts, but to Congress itself.

Id. at 94 n.3 (emphasis original). The district court found Section 43 severable from the balance of the Deregulation Act. *Id.* at 96 n.5.[3]

On July 16, 1985, the court of appeals reversed, setting forth an entirely different standard for determining severability. The court held that the test was not whether Congress would have enacted the rest of Section 43 in the form and language it chose if it knew the one-house veto was unconstitutional. Instead, it held that the remaining parts of the statute must remain as law unless petitioners could show that Congress would have enacted *no law* on the subject at all if at the time of enactment it had known that parts thereof would be declared unconstitutional:

> [T]he challengers must show that it is evident that Congress would have preferred no airline employee

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[3] Pursuant to 28 U.S.C. § 1252, BRAC filed a direct appeal and application for a stay of judgment pending appeal in the Supreme Court of the United States. On May 23, 1984, Chief Justice Burger, acting as Circuit Justice, denied BRAC's stay application, and BRAC later withdrew the appeal before the Supreme Court determined whether it had exclusive jurisdiction.

protection provision at all to the existing provision *sans* the veto provision.

766 F.2d at 1561. *See also id.* at 1560, 1563 and 1564.[4]

REASONS FOR GRANTING THE WRIT

This case presents a question of wide-reaching, fundamental importance: In what circumstances should the remaining parts of a section of a statute survive as valid law if one part of the same section is declared unconstitutional? In reversing the district court, the court of appeals set forth a novel standard of severability that is contrary to decisions of this Court and is in direct conflict with the severability analysis employed in decisions of other circuits. If allowed to stand, the test will result, as in this case, in statutes being permitted to operate in a way Congress never intended.[5]

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[4] On September 11, 1985, the court denied petitioners' petition for rehearing and suggestion for rehearing en banc. On September 28, 1985, the court also denied petitioners' motion for stay of the mandate. Because it invalidated Section 43 in its entirety on the legislative veto issue, the district court did not reach petitioners' other narrower challenges to the regulations. The remaining issues are now before the district court following the court of appeals' reversal and remand. Supreme Court review of the severability issue, which concerns the constitutionality of Section 43 in its entirety, however, is now timely under 28 U.S.C. § 1254(1). *See United States v. Nixon*, 418 U.S. 683 (1974); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949).

[5] The court of appeals also improperly rejected petitioners' contention that the appeal should have been brought directly in the Supreme Court, not the court of appeals. *See* 766 F.2d at 1555-56. Title 28 U.S.C. § 1252 gives the Supreme Court jurisdiction over appeals from district court decisions holding federal statutes unconstitutional in civil actions to which the government is a party. Since Judge Gesell held Section 43 unconstitutional in its entirety, *see* 594 F. Supp. at 96, and the other conditions of Section 1252 are met here, exclusive jurisdiction over this appeal properly lies in the Supreme Court. *See Donovan v. Richland County Association for*

Under the standard now adopted by the D.C. Circuit the remaining parts of a statute must remain in force unless the challenger can meet the heavy burden of showing that Congress would have enacted *no law* on the subject at all if at the time of enactment it had known that parts of the statute it did enact would be declared unconstitutional. *Alaska Airlines, Inc. v. Donovan*, 766 F.2d at 1560, 1561, 1563 and 1564. In order to satisfy this test, petitioners were required to prove that Congress would not have enacted any kind of protection for

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Retarded Citizens, 454 U.S. 389 (1982). For that reason alone, the court of appeals' decision must be vacated. *Id.* at 390.

The Supreme Court did refuse to accept jurisdiction in another legislative veto case, *EEOC v. Allstate Insurance Co.*, 104 S. Ct. 3499 (1984), but it gave no reasons, and the issue presented there, which involved a challenge to the *remedy* ordered by the district court, rather than a challenge to the court's holding that the statute in question was unconstitutional, *see id.* at 3499 (Burger, C.J., dissenting), is distinguishable from the issue presented here. Appellants below did not merely appeal the remedy ordered by Judge Gesell, but instead directly challenged his conclusion that the legislative veto provision was not severable from the remainder of Section 43, thus rendering the entire section unconstitutional. *See* Brief for Appellant Secretary of Labor at 1-2. This Court has recognized that if an entire statute is invalidated because it contains an unconstitutional part, the constitutionality of the *entire statute* is at issue. *See, e.g., Chadha*, 462 U.S. at 931 (issue is whether "§ 244 in its entirety is violative of the Constitution"). This case, therefore, is squarely within the scope of Section 1252:

> If the District Court's dismissal is to be overturned, the appellate court must overturn the holding that the Act in its entirety is unconstitutional. In the words of *Heckler v. Edwards* [104 S. Ct. 1532, 1538 (1984)], "the issue on appeal is the holding of statutory constitutionality."

EEOC v. Allstate, 104 S. Ct. at 3501 (Burger, C.J., dissenting). Since appellants had a right to pursue a direct appeal in the Supreme Court, the court of appeals was deprived of jurisdiction. *Donovan v. Richland County*, 454 U.S. at 389-90; 28 U.S.C. § 1291 (1982) ("courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court").

displaced airline employees if it had known that it could not exercise a veto power over DOL's regulations purporting to implement the program it authorized. This standard ignores the very real possibility that, although Congress wanted some type of employee protection plan, it could well have preferred a different statute—*e.g.*, one with less discretion left to DOL—had it known that it was without power to veto the program created by the agency regardless of how far the program strayed from Congress' intent. In this case the issue is not theoretical for, as shown in Part III below, the congressional conference committee had a clear choice of another, more traditional form of employee protection in the House bill, which did not contain a legislative veto. Instead, the conference committee opted for the novel approach authorized by the Senate which was subject to the veto check.

The well-established precedent of this Court, as well as other circuits, discussed in Parts II and III *infra*, unequivocally demonstrates that the question is not whether Congress would have preferred *some* legislation on the issue to nothing at all, but whether Congress would have enacted the surviving provisions in the form and language it actually chose had it known that other parts of the same section would be declared invalid. To hold otherwise would allow a statute to remain on the books simply because it addresses an issue of concern to Congress, even though it creates rights and duties different from those Congress would have created if the court had left to it the task of enacting constitutionally valid legislation.

The court of appeals' new standard for ascertaining congressional intent whenever part of a statute is invalidated extends far beyond the confines of this case. This new test may have some superficial appeal since invalidation of the entire statute under the traditional standard often results in a legislative vacuum in the subject area—at least until Congress acts again. The D.C. Cir-

cuit's approach, however, would require the courts to rewrite acts of Congress by excising certain provisions. The result would be affirmative legislation which does not operate as Congress intended.

Since it is almost impossible for a challenging party to show that Congress would have preferred no legislation at all in a subject area where it has chosen to legislate, the D.C. Circuit test virtually guarantees severance. Thus, the practical difference between this new test and the traditional standard applied by Judge Gesell is that statutes will now survive even though it is evident that Congress would have enacted a different type of statute without the invalid provisions. The courts will be creating laws that Congress would not have created because the courts will presume that Congress would rather have something than nothing. This approach overlooks the fact that Congress is perfectly capable of filling the vacuum of no legislation with a statute of its own design rather than the court's design. Any burden this places on Congress is no greater than the burden placed by the Constitution, and it avoids judicial intervention into the legislative process. That intervention is analogous to the legislative intervention into the executive function that this Court declared invalid in *Chadha*, or the executive intervention into the legislative process epitomized by the item veto. In each case, what remains after the intrusion is a program which functions inconsistently with the desires of the constitutionally responsible branch of government. Given the importance of the standard of legislative intent applied by the D.C. Circuit, its test, both new and novel, should be reviewed by this Court.

Such review is desirable for additional, practical reasons as well in the wake of this Court's invalidation of legislative veto provisions in *Chadha*. Since Congress has reserved a legislative veto power in nearly 200 statutes, *see Chadha*, 462 U.S. at 967 (White, J., dissenting), the severability of those provisions will continue to be

addressed in the lower courts until Congress has amended each law, or until each statute has been judicially reviewed. Without further guidance from this Court, the lower courts will continue to struggle with the severability issue and formulate an array of different approaches that will inevitably yield inconsistent results. *See, e.g., EEOC v. Pan American World Airways*, 576 F. Supp. 1530, 1535 (S.D.N.Y. 1984) ("there is no clear signal from the Supreme Court to assist the inferior courts in dealing with a host of foreseeable post-*Chadha* problems."). *See also EEOC v. Allstate Insurance Co.*, 104 S. Ct. 3499 (1984) (Burger, C.J., and O'Connor, J., dissenting from dismissal of appeal for want of jurisdiction) (acknowledging that "lingering questions" remain in the wake of *Chadha*); *Process Gas Consumers Group v. Consumer Energy Council of America*, 463 U.S. 1216, 1218 n.* (1983) (White, J., dissenting) (case presents the "important question of whether the legislative veto is severable").

I. THE TEST FOR SEVERABILITY ADOPTED BY THE COURT OF APPEALS IS CONTRARY TO SUPREME COURT PRECEDENT

For more than half a century this Court has held consistently that if one part of a statutory section is declared unconstitutional the entire section must fall if " 'it is evident that the Legislature would not have enacted *those provisions* which are within its power, independently of that which is not.' " *Chadha*, 462 U.S. at 931-32 (emphasis added) (*quoting Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932)). *See also Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (per curiam). Under that standard, inseverability does not require a judicial conclusion that Congress would have preferred no legislation on the subject rather than a statute with the invalid part severed. Challenged legislation must fall if Congress would have enacted *either* no statute at all *or* a statute in different form and lan-

guage. *See, e.g., Sloan v. Lemon*, 413 U.S. 825, 834 (1973) (severability improper if the remaining provisions would "create a program quite different from the one the legislature actually adopted.")

The question of severability is a simple one: "What was the intent of the lawmakers?" *Carter v. Carter Coal Co.*, 298 U.S. 238, 312 (1936).[6] Again, the relevant legislative intent is not whether Congress would have preferred the remaining parts of the statute to nothing at all because that would permit a court, through selective severance of provisions, to rewrite the statute in a way Congress did not intend. The Court has cautioned time and again that a reviewing court is not

> license[d] . . . to usurp the policy-making and legislative functions of duly-elected representatives . . . . "[A]lthough this court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . . or judicially writing it."

Heckler v. Mathews, 104 S. Ct. 1387, 1396 (1984) (*quoting Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964). These principles of judicial restraint apply with equal force in the context of severability analysis:

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[6] Even though the Deregulation Act does not contain a severability clause, the court of appeals relied on a strong presumption in favor of severability to shortcut its analysis, citing *Chadha* and *Regan v. Time, Inc.*, 104 S. Ct. 3262, 3269 (1984), for the proposition that a statute is presumed severable if what remains is "fully operative as law." 766 F.2d at 1559-60. The statute at issue in *Chadha*, however, contained a severability clause, and the "presumption" in *Regan* was not embraced by the majority of the Court. In the final analysis, "severability is exclusively a question of legislative intent." *Regan*, 104 S. Ct. at 3275 n.2 (Brennan, J., concurring in part and dissenting in part) (*citing New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982)). *See also Carter v. Carter Coal Co.*, 298 U.S. at 313; *Railroad Retirement Board v. Alton Railroad*, 295 U.S. 330 (1935). As shown in Part III *infra*, the court's heavy reliance on the presumption distorted its analysis of congressional intent.

> [C]ourts addressing questions of severability should be guided by Chief Justice Taft's admonition "that amendment may not be substituted for construction, and that a court may not exercise legislative functions to save [a] law from conflict with constitutional limitation."

Regan v. Time, Inc., 104 S. Ct. 3262, 3275 (1984) (Brennan, J., concurring in part and dissenting in part) (*quoting Yu Cong Eng v. Trinidad*, 271 U.S. 500, 518 (1926)). *See also Califano v. Westcott*, 443 U.S. 76, 94-95 (1979) (Powell, J., concurring in part and dissenting in part) ("[The court] should not use its remedial powers to circumvent the intent of the legislature. . . . Rather than thus rewriting [the statute], we should leave this task to Congress.")

This Court has never held that a severed statute can remain as law simply because a reviewing court concludes that Congress would have preferred the modified version of what it enacted to nothing at all. *See Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964) ("[T]his court will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutional defects"). The relevant issue of legislative intent is whether "the legislature would have been satisfied *with what remained*." *Champlin Refining*, 286 U.S. at 235 (emphasis added); *see also Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 184-85 (1932) (if the court concludes "that the legislature would not have been satisfied with the statute unless it had included the invalid part," it must hold the law to be nonseverable).

The Court has recently reaffirmed the standard applied by the district court but rejected by the court of appeals in this case, stating that the severability issue is "whether the . . . Legislature *would have enacted the statute* with-

out the invalid portion." *Hooper v. Bernalillo County Assessor*, 105 S. Ct. 2862, 2869 (1985) (emphasis added). The Court's decision in *Regan v. Time* is another recent example of this well-established approach. A plurality there held that statutory prohibitions on the use of photographic reproductions of currency violated the First Amendment insofar as they prohibited use for certain purposes, but found that valid provisions of the same statute regulating the size and color of such reproductions could be enforced. In concluding that the size and color restrictions were severable from the purpose requirement, the plurality asked whether the valid restrictions *as enacted* fulfilled the congressional purpose. *See Regan*, 104 S. Ct. at 3270. They did not ask whether Congress would have preferred not to regulate the reproduction of currency at all if it had known at the time of enactment that it could not restrict the purposes of such reproductions.

Besides *Regan*, the only other recent decision of this Court discussing the severability doctrine at any length is *Chadha*, but that case presented a much easier question because the statute at issue contained a severability clause, thus creating a presumption of severability and making it unnecessary to "embark on [the] elusive inquiry" of legislative intent. 462 U.S. at 932.[7] Despite the

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[7] Section 43 is not subject to the general severability provision enacted in 1958 as part of the Federal Aviation Act ("FAAct"), 49 U.S.C. app. § 1301 note (1982). Examination of the entire ADA reveals numerous provisions that do expressly amend the FAAct, *see* §§ 2-40, 92 Stat. at 1705-47, as well as provisions that amend other federal statutes. *See, e.g.*, § 41, *id.* at 1748 (repealed 1982) (amending the Airport and Airway Development Act of 1970). But unlike these other provisions, the text of Section 43 of the Deregulation Act does not purport to amend the FAAct or any pre-existing federal statute. *See* "codification" note to 49 U.S.C. app. § 1552 (1982) (Section 43 was "enacted as part of the Airline Deregulation Act of 1978, and not as part of the Federal Aviation Act of 1958. . . ."). Thus, Section 43 is not part of the FAAct, and

severability clause, the Court still examined the legislative history in detail to ascertain whether Congress would have enacted the remaining provisions without the legislative veto. *Id.* at 932-34. Justice Rehnquist's severability analysis in dissent is particularly instructive. Joined by Justice White, he observed that the Court has held several times that provisions limiting the operation of a statute, such as veto provisions, are not generally severable because

> "by rejecting the exceptions intended by the legislature . . . the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what anyone can say it would have enacted in view of the illegality of the exceptions."

Id. at 1014 (Rehnquist, J., dissenting) (*quoting Spraigue v. Thompson*, 118 U.S. 90, 95 (1886)).[8]

The legislative history of Section 43 demonstrates that Congress would not have granted DOL unfettered rulemaking authority without retaining a one-house veto. *See infra* at Part III. Under traditional severability analysis, that fact would mandate a finding of nonseverability, but under the court of appeals' test, it is not enough. Petitioners also had to prove that Congress

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the general severability clause enacted twenty years earlier in the FAAct is not applicable to Section 43.

The absence of a severability clause "itself suggests the inseverability of the provision." *Process Gas Consumers Group v. Consumer Energy Council of America*, 463 U.S. at 1218 n.* (White, J., dissenting). *See also Carter Coal*, 298 U.S. at 312. *Cf. United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968) ("the ultimate determination of severability will rarely turn on the presence or absence of such a clause").

[8] *See also Southwestern Oil Co. v. Texas*, 217 U.S. 114 (1910); *El Paso & Northeastern Railway v. Gutierrez*, 215 U.S. 87, 97 (1909).

would have preferred no employee protection plan if it could not have used the veto device as a check on DOL's program. Such a standard ignores the only relevant inquiry—whether, absent the invalid provision, Congress would have been satisfied with what remained. It would be a rare case in which a responsible court could conclude confidently that Congress would have preferred no legislation at all on a given issue rather than a modified version of what it enacted. If the court of appeals' decision is not reviewed, it necessarily will allow statutes to operate, as in this case, in a way Congress did not intend, simply because the court believes that the revised statute is "better than nothing."

II. THE DECISION BELOW CREATES A CONFLICT IN THE SEVERABILITY ANALYSIS AMONG THE CIRCUIT COURTS

Courts in other circuits almost uniformly have agreed that the reviewing court must look at the statute as actually enacted and determine whether Congress would have been satisfied with the statute in the absence of the invalid provision, not whether the legislature would prefer no statute at all rather than a modified version of it.[9]

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[9] The only court that has adopted an approach similar to that of the D.C. Circuit is the Temporary Emergency Court of Appeals in *Gulf Oil Corp. v. Dyke*, 734 F.2d 797 (Temp. Emer. Ct. App. 1984), *cert. denied*, 105 S. Ct. 173 (1984), on which the court in this case relied. But unlike the D.C. Circuit, the court in *Gulf Oil* did not hold the statute severable exclusively on the theory that Congress would have preferred the modified version to nothing at all—based on its examination of the legislative history, the court first held that the statutes under review (two energy policy acts) would have been enacted without the veto provisions. *See* 734 F.2d at 804. In contrast, by limiting its inquiry to whether Congress would have preferred no employee protection for airline employees if it could not have retained a veto power, the court in this case failed even to consider whether Congress would have enacted this particular statute—with its broad delegation to DOL to establish a program—had it known that the legislative veto device was not available to oversee the program DOL adopted.

The Second Circuit, in invalidating the entire Reorganization Act of 1977, 5 U.S.C. §§ 901, *et seq.* (1982), because it contained an unconstitutional, inseverable legislative veto provision, applied the same severability standard employed by the district court in this case: "[W]hether Congress would have delegated to the President the broad reorganizing authority granted him by the Act without reserving for itself the one-house veto power contained in 5 U.S.C. § 906(a)." *EEOC v. CBS, Inc.*, 743 F.2d 969, 971 (2d Cir. 1984).[10] The court initially observed that "to hold the veto provision to be severable would confer upon the statute a positive operation beyond the legislative intent . . . ." *Id.* (*citing Spraigue v. Thompson*, 118 U.S. 90, 95 (1886)). If the veto provision were severable, "the President alone then would have been permitted to reorganize the executive branch without any congressional control over the process, short of formal legislation, and this would have been contrary to Congress's intent as expressed in the Act, in the debates on the Act, and in the committee reports that preceded its enactment." 743 F.2d at 971-72. The court concluded that "without such a provision, Congress would have been unwilling to delegate to the President such extensive authority to reorganize the executive branch." *Id.* at 973.[11]

The Fifth Circuit, reviewing the severability of the same veto provision, came to the opposite conclusion but

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[10] The court framed the issue alternatively as "whether Congress was willing to turn the reorganization process over to the President unrestricted and unsupervised." 743 F.2d at 974.

[11] Shortly after the Second Circuit invalidated the Reorganization Act, Congress reenacted the statute without the veto provision. *See* Reorganization Act Amendments of 1984, Pub. L. No. 98-614, 98 Stat. 3192 (1984). Thus, instead of judicial modification of the statute, as the D.C. Circuit would counsel, Congress passed revised legislation as the Constitution intended. *Cf. Regan v. Time, Inc.*, 104 S. Ct. at 3290 (Powell, J., concurring in part and dissenting in part) ("[O]ne may assume that Congress—if necessary—would move promptly to enact a more carefully drawn statute.").

employed the same standard for determining severability: "whether Congress would have enacted the remainder of the statute in the absence of the invalid provision." *EEOC v. Hernando Bank, Inc.*, 724 F.2d 1188, 1190 (5th Cir. 1984). Neither the Fifth nor the Second Circuit asked whether Congress would have preferred no statute governing the reorganization of the executive branch. Both courts correctly sought to ascertain whether Congress would have given the President such extensive authority in the absence of the legislative veto provision.

The conflict between the standards applied in the Fifth and D.C. Circuits was graphically demonstrated in *Scheinberg v. Smith*, 659 F.2d 476 (5th Cir. 1981). A Florida abortion statute required a woman under age 18 to obtain parental consent or a court order authorizing the abortion. The Fifth Circuit held the court approval provision unconstitutional in part because it authorized the court to act in the "best interests" of the minor, without regard to the minor's maturity as is required by *Bellotti v. Baird*, 443 U.S. 622 (1979). *See* 659 F.2d at 480-81. The issue was whether the "best interests" clause could be severed, leaving intact the parental consent provision and the modified court approval option. Despite its conclusion that "[t]he Florida Legislature clearly wished to regulate an unmarried minor's access to abortion . . .," *see id.* at 481, the court held that severance was improper and "refuse[d] the invitation to enter the state legislative arena." *Id.* at 482.

The severability standard adopted in the Fourth Circuit is also diametrically opposed to the D.C. Circuit's approach. In holding a legislative veto provision in the Federal Salary Act, 2 U.S.C. § 359(1)(B) (1976), inseverable from the remainder of the Act, the court looked to the *specific provisions* enacted and asked whether "Congress would . . . have granted the President the power to set congressional, executive, and judicial salaries without this restriction." *McCorkle v. United States*, 559

F.2d 1258, 1262 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978). In concluding that Congress would not have delegated such broad authority without the veto provision, the court stated:

> When the questioned clause restricts a power granted by the legislature, the case against severance is strong. Otherwise, the scope of the power would be enlarged beyond the legislature's intent.

Id. at 1261-62 (*citing Davis v. Wallace*, 257 U.S. 478, 484 (1922)). The First and Sixth Circuits also employ severability doctrines in conflict with the approach of the D.C. Circuit. *See Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855, 863 (1st Cir. 1980) (issue is "whether the legislature would have enacted [the valid portion] independently of the [unconstitutional portions]"); *Muller Optical Co. v. EEOC*, 743 F.2d 380, 387-88 (6th Cir. 1984) (issue is "whether Congress would have passed the statute absent the offending provision .... Whether Congress would have passed the Reorganizational [*sic*] Act without the one-House veto provision ....").[12]

In each of these cases the court tried to determine whether the remaining provisions would operate as the legislature intended and refused to speculate on whether the legislature might have preferred the remaining provisions to no legislation at all. The cases thus demonstrate an approach to severability that upholds the intent of the legislature without "usurp[ing] the policy-making and legislative functions of duty-elected representatives." *Heckler v. Mathews*, 104 S. Ct. at 1396. By requiring petitioners to prove that Congress would have preferred no protection for employees at all, the court of appeals impermissibly substituted its own judgment for that of

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[12] *See also Gavett v. Alexander*, 477 F. Supp. 1035, 1050 (D.D.C. 1979) (*quoting Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 184-85 (1932)); *EEOC v. Allstate Insurance Co.*, 570 F. Supp. 1224, 1230, 1232 (S.D. Miss. 1983), *appeal dismissed*, 104 S. Ct. 3499 (1984).

Congress. The proper inquiry is whether Section 43 would have been enacted in its current form if Congress had known it could not retain power to veto DOL regulations implementing the program. If it would not have been so enacted, allowing Section 43 to stand creates a law that the legislature did not intend to enact.

III. UNDER TRADITIONAL SEVERABILITY DOCTRINE, THE LEGISLATIVE VETO PROVISION IS INSEVERABLE FROM THE REMAINDER OF SECTION 43

By adhering to its standard of severability, the court of appeals did not give proper weight to several critical facts demonstrating that the surviving provisions of Section 43 would not operate as Congress intended. The court actually acknowledged the validity of many of petitioners' assertions, but rejected them all because they could not satisfy the court's "exacting" severability standard. 766 F.2d at 1565. *See id.* at 1561, 1563, 1564.

The court accepted petitioners' assertion that the unusual legislative review provision in Section 43 "reflects, as a whole, a unique combination of features." *Id.* at 1563. But the court dismissed the elaborate nature of the review process as irrelevant because it did not "speak to the issue at hand," *i.e.*, whether "Congress, or even the committees involved, would have preferred no employee protection plan to the adopted plan divorced of its legislative veto provision." *Id.* at 1564. Petitioners did not contend that by devising this unique review procedure Congress demonstrated a preference for no employee protection at all over a program absent a legislative veto.[13]

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[13] There is substantial support in the legislative history, however, for the proposition that Congress did not believe that the program would be necessary, and that the provision was included as a "contingency" to address a "theoretical possibility." S. Rep. No. 631, 95th Cong., 2d Sess. 113-15 (1978). Thus, the veto provision gave Congress, *inter alia*, a second chance to determine whether there was even a need for the program as well as the precise design of it.

Petitioners did contend, however, that in delegating to DOL the power to establish a new type of regulatory program that could impose a severe financial burden on the government, that would intrude seriously into airline hiring and the rights of other individuals desiring employment in the airline industry, and that was fundamentally inconsistent with deregulation, Congress intended to ensure its ultimate control over the program's design. The court's decision gives the Secretary the broad regulatory authority to design the EPP but takes away the control Congress deemed critical as a condition of such an open-ended grant.

The court also recognized that the Deregulation Act grants or addresses at least twenty-five distinct delegations of authority, but Section 43 is the only provision in the entire Act to which a legislative veto applies, and it is an integral part of the same subsection (f) which grants the regulatory authority. *See* 766 F.2d at 1563. Adhering to its novel severability test, the court dismissed this point as irrelevant because it "still does not speak to whether Congress would have preferred no employee protection plan at all . . . ." *Id.*

The court's erroneous severability standard also colored its view of the Conference Committee compromise on Section 43. Whereas the House had proposed a traditional employee protection plan that was long established in other regulated transportation industries (*i.e.*, responsibility for employee protection is vested in government or in parties responsible for the dislocations), the Senate version constituted a new, controversial and more broadly reaching intrusion into the private labor market. The Conference Committee adopted the Senate version, which included the veto, but made two important modifications. The revised Section 43 provided less guidance to DOL on eligibility for the rehire program, but simultaneously increased congressional scrutiny.[14] H.R. Rep. No. 1779,

[14] The Conference Committee eliminated a "qualifying dislocation" requirement as a prerequisite for protected employees seeking

95th Cong., 2d Sess. 105-06 (1978). The significance of the compromise is not that it shows that Congress would have declined to enact any protection program had the agreement not been reached, but rather that Congress would not have adopted the novel, unfamiliar Senate version in the form it did, granting almost unlimited authority to DOL to create the EPP, had its members not retained ultimate control over the parameters of the program. If the court's decision is not reviewed, the employee protection program will be permitted to function in a way neither House intended.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue, and the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit should be reviewed by this Court.

Respectfully submitted,

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the right of first hire, leaving unclear Congress' intent as to the circumstances under which employees adversely affected by the Deregulation Act would be eligible for the mandatory hiring preference. H.R. Rep. No. 1779, 95th Cong., 2d Sess. 105 (1978). The Senate bill had provided simply for a sixty-day legislative review period before both houses of Congress. *Id.* But the Conference expanded this review process by adding the committee submission requirement and the six-month deadline which combined with the one-house veto to guarantee that the members of Congress who had charted the path of airline deregulation could actively guide development of the EPP.